nonexempt work will be considered substantial if it occupies more than 20 percent of the time worked by the employee during the workweek.

[13 FR 1377, Mar. 17, 1948]

Subpart E—Taxicab Operators

§ 786.200 Enforcement policy concerning performance of nonexempt work.

The Division has taken the position that the exemption provided by section 13(b)(17) of the Fair Labor Standards Act will be deemed applicable even though some nonexempt work (that is, work of a nature other than that which characterizes the exemption) is performed by the employee during the workweek, unless the amount of such nonexempt work is substantial. For enforcement purposes, the amount of nonexempt work will be considered substantial if it occupies more than 20 percent of the time worked by the employee during the workweek.

[32 FR 15426, Nov. 4, 1967]

Subpart F—Newspaper Publishing

§ 786.250 Enforcement policy.

The exemption provided by paragraph 13(a)(8) of the Fair Labor Standards Act of 1938 applies to ''any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto.'' For the purpose of enforcement, it is the Divisions' position that such an employee is within the exemption even though he is also engaged in job printing activities. if less than 50 percent of the employee's worktime during the workweek is spent in job printing work, some of which is subject to the Act. If none of the job printing activities are within the general coverage of the Act, the exemption applies even if the job printing activities equal or exceed 50 percent of the employee's worktime. However, this exemption is not applicable if the employee spends 50 percent or more of his worktime in a workweek on job printing, any portion of which is within the general coverage of the Act on an individual or enterprise basis.

[32 FR 15426, Nov. 4, 1967]

PART 788—FORESTRY OR LOGGING OPERATIONS IN WHICH NOT MORE THAN EIGHT EMPLOYEES ARE EMPLOYED

Sec.

AUTHORITY: Secs. 1–19, 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

SOURCE: 34 FR 15794, Oct. 14, 1969, unless otherwise noted.

§ 788.1 Statutory provisions.

Section 13(a)(13) of the Fair Labor Standards Act of 1938, as amended, provides an exemption from the minimum wage and overtime requirements of the Act, as follows:

> The provisions of sections 6 and 7 shall not apply with respect to * * * any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.

This exemption, formerly section 13(a)(15) of the Act, was amended by the Fair Labor Standards Amendments

of 1966 (80 Stat. 830) to change the number of employees limitation from 12 to eight, and to redesignate it as section 13(a)(13).

§ 788.2 Matters not discussed in this part.

The exemption in section 13(a)(13) of the Act need not be considered unless the employee is ''engaged in commerce or the production of goods for commerce'' or is employed in an ''enterprise engaged in commerce or in the production of goods for commerce,'' as those words are defined in the Act, so as to come within the general scope of sections 6 and 7. The principles of coverage are discussed in part 776 of this chapter and the discussion will not be repeated in this part. Neither does this part discuss the exemptions provided in section 13(a)(6) and 13(b)(12), or section 3(f) which includes in the definition of agriculture forestry or lumbering operations performed by a farmer or on a farm as an incident to or in conjunction with certain farming operations. (See part 780 of this chapter.)

§ 788.3 Purpose of this part.

The purpose of this part is to make available in one place the views of the Department of Labor with respect to the application and meaning of the provisions of section 13(a)(13) of the Act which will provide ''a practical guide to employers and employees as to how the office representing the public interest in enforcement of the law will seek to apply it'' (*Skidmore* v. *Swift & Co.*, 324 U.S. 134).

§ 788.4 Significance of official interpretations.

The interpretations contained in this part indicate, with respect to section 13(a)(13) of the Act which refers to small forestry or lumbering operations, the construction of the law which the Secretary of Labor and the Administrator believes to be correct and which will guide them in the performance of their duties under the Act unless and until they are otherwise directed by authoratative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect.

§ 788.5 Reliance on offical interpretations.

Under section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259), official interpretation issued under the Fair Labor Standards Act of 1938 may, under certain circumstances, be controlling in determining the rights and liabilities of employers and employees. The interpretations of the law contained in this part are official interpretations on which reliance may be placed as provided in section l0 of the Portal-to-Portal Act so long as they remain effective and are not modified, rescinded, or determined by judicial authority to be incorrect. However, the failure to discuss a particular problem in this part or in the interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor or the Administrator with respect to such problem or to constitute an administrative interpretation or practice or enforcement policy.

§ 788.6 Scope of the section 13(a)(13) exemption.

Employees will not be held exempt under section 13(a)(13) unless they are clearly shown to come within its terms. (*Wirtz* v. *F. M. Sloan Co.*, 4ll F. 2d 56 (C.A. 3), 18 WH Cases 878; *Gatlin Lumber Co.* v. *Mitchell*, 287 F. 2d 76 (C.A. 5) cert. denied, 366 U.S. 963.) By its terms, the exemption is limited to those employed in the named operations by an employer who employs not more than eight employees therein. The named operations are described in terms of ordinary speech and mean what they mean in ordinary intercourse in this context. These operations include the incidental activities normally performed by persons employed in them, but do not include mill operations.

§ 788.7 "Planting or tending trees."

Employees employed in ''planting or tending trees'' include those engaged in weeding, preparing firebreaks, removing ''seeding, planting seedlings, pruning, rot or rusts, spraying, and similar operations when the object is to bring about, protect, or foster the growth of trees.'' ''Tending trees'' would also include watching the timberland to guard against thefts and fire (*Gatlin*

Lumber Co. v. *Mitchell*, 287 F. 2d 76, cert. den. 366 U.S. 963).

§ 788.8 "Cruising, surveying, or felling timber."

Employees engaged in ''cruising * * * timber'' include all those members of a field crew whose purpose is to estimate and report on the volume of marketable timber. Employees engaged in ''surveying * * * timber'' include the customary members of a crew accomplishing that function such as the chairmen, the transit men, the rodmen, and the axmen who clear the ground of brush or trees in order that the transit men may obtain a clear sight. Similarly, the usual members of a crew which go to the woods for the purpose of felling timber and preparing and transporting logs are engaged in operations described in the exemption. Typically included, when members of such a crew, are fellers, limbers, skidders, buckers, loaders, swampers, scalers, and log truck drivers.

§ 788.9 "Preparing * * * logs."

Preparing logs includes, where appropriate, removing the limbs and top, cutting them into lengths, removing the bark, and splitting or facing them when done at the felling site, but does not include such operations when done at a mill. Employees engaged in sawmill, tie mill, and other operations in connection with the processing of logs, such as the production of lumber, are not exempt.

§ 788.10 "Preparing * * * other forestry products."

As used in the exemption, ''other forestry products'' mean plants of the forest and the natural properties or substances of such plants and trees. Included among these are decorative greens such as holly, ferns and Christmas trees, roots, stems, leaves, Spanish moss, wild fruit, and brush. Gathering and preparing such forestry products as well as transporting them to the mill, processing plant, railroad, or other transportation terminal are among the described operations. Preparing such forestry products does not include operations which change the natural physical or chemical condition of the products or which amount to extracting as distinguished from gathering, such as shelling nuts, or mashing berries to obtain juices.

§ 788.11 "Transporting [such] products to the mill, processing plant, railroad, or other transportation terminal."

The transportation or movement of logs or other forestry products to a ''mill processing plant, railroad, or other transportation terminal'' is among the described operations. Loading and unloading, when performed by employees employed in the named operations, are included as exempt operations. Loading logs or other forestry products onto railroad cars or other transportation facilities for further shipment if performed as part of the exempt transportation will be considered a step in the exempt transportation (*Woods Lumber Co.* v. *Tobin*, 199 F. 2d 455 (C.A.5)). However, any other loading, transportation, or other activities performed in connection with the logs or other forestry products after they have been unloaded at one of the described destinations is not exempt. ''Other transportation terminal'' refers to any place where there are established facilities or equipment for the shipment or transportation of logs or other forestry products. Motor carrier yards, docks, wharves, or similar facilities are examples of other transportation terminals, but the place where logs are picked up by contract motor carriers or haulers at the site of the woods operations for transportation to the mill, processing plant, or railroad is not such a terminal.

§ 788.12 Limitation of exemption to specific operations in which "number of employees * * * does not exceed eight."

Regardless of his duties, no employee is exempt under section 13(a)(13) unless ''the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.''

§ 788.13 Counting the eight employees.

The determination of the number of employees employed in the named operations is to be made on an occupational and a workweek basis. Thus the exemption will be available in one

workweek when eight or less employees are employed in the exempt operations and not in another workweek when more than that number are so employed. For a discussion of the term ''workweek'' see part 778 of this chapter. The exemption will not be defeated, however, if one or more of the eight employees so engaged is replaced during the workweek, for example, by reason of illness. But if additional employees are employed during the workweek in the named operations, even if they work on a different shift, the exemption would no longer be available if the total number exceed eight. Similarly, all of an employer's employees employed in any workweek in the named operations must be counted in the eight regardless of where the work is performed or how it is divided. Thus if an employer employs four employees in felling timber and preparing logs at one location and five at another location in those operations, the exemption would not be available. Similarly, if he employs six employees in such operations and three other employees in transportation work as discussed in §788.11, the exemption could not apply. Under such circumstances he would be employing more than eight employees in the named operations. The fact that some of these employees may not be engaged in commerce or the production of goods for commerce or may be engaged in other exempt operations will not affect these conclusions (*Woods Lumber Co.* v. *Tobin*, 199 F. 2d 455 (C.A. 5)). Except for replacements, therefore, all of an employer's employees employed in the named operations in a workweek must be counted, regardless of where they perform their work or in which of the named operations or combinations of such operations they are employed. The length of time an employee is employed in the named operations during a workweek is also immaterial for the purpose of applying the numerical limitation. Thus, even if an employee would not himself be exempt because he is engaged substantially in nonexempt work (see §788.17), nevertheless, if, as a regular part of his duties, he is also engaged in the operations named in the exemption, he must be counted in determining whether the eight employee limitation is satisfied.

§ 788.14 Number employed in other than specified operations.

The exemption is available to an employer, however, even if he has a total of nine or more employees, if only eight of them or less are employed in the named operations. Thus, if such an employer employs only eight employees in the named operations and others in operations not named in the exemption, such as sawmill operations, the exemption is not defeated because of the fact that he employs more than eight employees altogether. It will not apply, however, to those engaged in the operations not named in the exemption.

§ 788.15 Multiple crews.

In many cases an employer who operates a sawmill or concentration yard will be supplied with logs or other forestry products by several crews of persons who are engaged in the named operations. Frequently some or all of such crews, separately considered, do not employ more than eight persons but the total number of such employees is in excess of eight. Whether the exemption will apply to the members of the individual crews which do not exceed eight will depend on whether they are employees of the sawmill or concentration yard to which the logs or other forestry products are delivered or whether each such crew is a truly independently owned and operated business. If the number of employees in such a truly independently owned and operated business does not exceed eight, the exemption will apply. On the other hand, the Secretary and the Administrator will assume that the courts will be reluctant to approve as bona fide a plan by which an employer of a large number of woods employees splits his employees into several allegedly ''independent businesses'' in order to take advantage of the exemption.

§ 788.16 Employment relationship.

(a) The Supreme Court has made it clear that there is no single rule or test for determining whether an individual is an employee or an independent contractor, but that the ''total situation

controls'' (see *Rutherford Food Corp.* v. *McComb*, 331 United States 722; *United States* v. *Silk*, 331 United States 704; *Harrison* v. *Greyvan Lines*, 331 United States 704; *Bartels* v. *Birmingham*, 332 United States 126). In general an employee, as distinguished from a person who is engaged in a business of his own, is one who ''follows the usual path of an employee'' and is dependent on the business which he serves. As an aid in assessing the total situation the Court mentioned some of the characteristics of the two classifications which should be considered. Among these are: The extent to which the services rendered are an integral part of the principal's business, the permanency of the relationship, the opportunities for profit or loss, the initiative judgment or foresight exercised by the one who performs the services, the amount of investment, and the degree of control which the principal has in the situation. The Court specifically rejected the degree of control retained by the principal as the sole criterion to be applied.

(b) At least in one situation it is possible to be specific: (1) Where the sawmill or concentration yard to which the products are delivered owns the land or the appropriation rights to the timber or other forestry products; (2) the crew boss has no very substantial investment in tools or machinery used; and (3) the crew does not transfer its relationship as a unit from one sawmill or concentration yard to another, the crew boss and the employees working under him will be considered employees of the sawmill or concentration yard. Other situations, where one or more of these three factors is not present, will be considered as they arise on the basis of the criteria mentioned in paragraph (a) of this section. Where all of these three criteria are present, however, it will make no difference if the crew boss receives the entire compensation for the production from the sawmill or concentration yard and distributes it in any way he chooses to the crew members. Similarly, it will make no difference if the hiring, firing, and supervising of the crew members is left in the hands of the crew boss. (See *Tobin* v. *LaDuke*, 190 F. 2d 977 (C.A. 9); *Tobin* v. *Anthony-Williams Mfg. Co.*, 196 F. 2d 547 (C.A. 8).)

§ 788.17 Employees employed in both exempt and nonexempt work.

The exemption for an employee employed in exempt work will be defeated in any workweek in which he performs a substantial amount of nonexempt work. For enforcement purposes nonexempt work will be considered substantial in amount if more than 20 percent of the time worked by the employee in a given workweek is devoted to such work. Where two types of work cannot be segregated, however, so as to permit separate measurement of the time spent in each, the employee will not be exempt.

PART 789—GENERAL STATEMENT ON THE PROVISIONS OF SECTION 12(a) AND SECTION 15(a)(1) OF THE FAIR LABOR STANDARDS ACT OF 1938, RELATING TO WRITTEN ASSURANCES

Sec.

AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

SOURCE: 15 FR 5047, Aug. 5, 1950, unless otherwise noted.

§ 789.0 Introductory statement.

(a) Section 12(a) and section 15(a)(1) of the Fair Labor Standards Act of 1938[1] (hereinafter referred to as the

[1] Pub. L. 718, 75th Cong., 3d sess. (52 Stat. 1060), as amended by the Act of June 26, 1940 (Pub. Res. No. 88, 76th Cong., 3d sess., 54 Stat. 616); by Reorganization Plan No. 2 (60 Stat. 616); by Reorganization Plan No. 2 (60 Stat. 1095), effective July 16, 1946; by the Portal-to-Portal Act of 1947, approved May 14, 1947 (61 Stat. 84); by the Fair Labor Standards Amendments of 1949, approved October

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